

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARL E. BERGER	:	DETERMINATION
	:	DTA NO. 817890
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Year 1999.	:	

Petitioner, Carl E. Berger, 31 Buccaneer Lane, East Setauket, New York 11733-1964, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 1999.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York on November 15, 2001 at 2:45 P.M. Petitioner appeared by his father David B. Berger. The Division of Taxation appeared by Barbara G. Billet, Esq. (Pamela Wolf).

Since neither party elected to reserve time to file a brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether the Division of Taxation properly determined that petitioner's purchase of a motor vehicle from an in-state dealer on June 19, 1999 while he was on active duty in the United States military service was subject to sales tax.

FINDINGS OF FACT

1. On June 19, 1999, petitioner herein, Carl E. Berger, purchased a new 1999 Ford F-150 pick-up truck from McCarville Ford, Inc. located in Centereach, New York. The sales invoice lists petitioner's address as 31 Buccaneer Lane, East Setauket, New York, which is the location of his parents' residence. The sales invoice also reflects that petitioner paid New York State sales tax of \$2,210.59 on the purchase of said vehicle.

2. On August 9, 1999, petitioner filed with the Division of Taxation ("Division") an Application for Credit or Refund of Sales and Use Tax wherein he sought a refund of the \$2,210.59 of sales tax he paid on the purchase of the vehicle. Pursuant to a letter dated September 9, 1999, the Division denied petitioner's application for refund for the following reason:

When a motor vehicle is purchased from an in-state dealer, the transaction is subject to sales tax, rather than the compensating use tax. Unlike the compensating use tax, the sales tax is due at the time of purchase of the motor vehicle by a New York State resident. Since the military deferment policy applies only to the imposition of the compensating use tax, the payment of the sales tax on the purchase of a motor vehicle from a New York State dealer cannot be deferred. Therefore, since you purchased a motor vehicle from a New York State dealer, the military deferment policy does not apply and a refund is not allowable.

3. Petitioner, a single individual, graduated from the State University of New York at Buffalo in May of 1999. Some six months prior to his graduation petitioner had joined the United States Marine Corps as a reservist and on April 12, 1999 he received orders to report to active duty on June 6, 1999 as his application to Officer Candidates School had been accepted. The orders which petitioner received on April 12, 1999 list his address as 313 Baynes Street, Apt 7, Buffalo, New York, which address was an off-campus residence he maintained while attending the State University of New York at Buffalo.

4. Prior to entering active duty petitioner relinquished his apartment in Buffalo, New York. On June 6, 1999, petitioner, as ordered, reported for active duty to the Commanding Officer, Officer Candidates School, Marine Corps Combat Development Command, Quantico, Virginia. From June 6, 1999 to date, petitioner has been continuously and permanently assigned by the United States Marine Corps to military bases in either Virginia or North Carolina, except for a five-month period in 2001 when he was assigned to several bases located overseas. Since he has been assigned to active duty petitioner has resided in either bachelor officer quarters located on base or in apartments he leased off base.

5. Petitioner's father, David B. Berger, acting on his son's behalf under a durable power of attorney, signed the sales contract for the purchase of the vehicle in question and actually took delivery of the vehicle for his son on June 19, 1999. The vehicle was registered in petitioner's name in New York and remained in his parents' driveway for approximately two to four weeks before he was able to secure leave, return to his parents' home and bring the vehicle to Virginia.

CONCLUSIONS OF LAW

A. It is well established that tangible personal property purchased in (delivered in) New York, including motor vehicles so purchased, is subject to sales tax. However, as to the sale of motor vehicles, the Legislature has provided a specific and limited exemption whereby nonresidents who satisfy certain conditions may purchase a motor vehicle without being subjected to tax. Specifically, Tax Law § 1117(a) provides as follows:

Certain sales of motor vehicles

(a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within this state, provided that:

(1) the purchaser, at the time of taking delivery

(i) is a nonresident of this state, and

(ii) has no permanent place of abode in this state,

(iii) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state;

(2) the vendor of such motor vehicle does not issue to such purchaser with respect to such motor vehicle either a temporary certificate of registration pursuant to subdivision seven of section four hundred twenty of the vehicle and traffic law or a temporary registration pursuant to section four hundred twenty-a of the vehicle and traffic law, or other like certificate or registration;

(3) the purchaser does not register such motor vehicle in this state prior to registering such motor vehicle in another state or jurisdiction; and

(4) prior to taking delivery such purchaser furnishes to the vendor any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require to ensure proper administration of the tax imposed under subdivision (a) of section eleven hundred five.

B. The first issue to be determined in this matter is whether petitioner is a resident or nonresident of New York State. Regulation 20 NYCRR 526.15, promulgated by the Division effective June 1, 1990, provides the following definition of resident:

Resident. - (a) Individuals. (1) Any individual who maintains a permanent place of abode in this State is a resident.

(2) Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling place may be a house, apartment or flat; a room, including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; *housing provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation*; or a trailer, mobile home, houseboat or any other premises.

* * *

Example 4: An individual serving in the Armed Forces of the United States occupies housing on a Federal military base within New York State. Such individual is a resident of New York State.

* * *

(d) Military personnel. Any person serving in the Armed Forces of the United States, whose dwelling place is in the State, whether on or off a Federal military base or reservation, is a resident of New York (emphasis added).

C. In the instant matter, petitioner has established that he was a nonresident of New York at the time he purchased the motor vehicle in question. Petitioner entered the military service on June 6, 1999, some two weeks prior to the date he purchased the vehicle. Prior to entering military service, petitioner relinquished the permanent place of abode he maintained in Buffalo, New York. From June 6, 1999 to date, petitioner has been permanently and continuously assigned to military service outside the State of New York and he has maintained a permanent place of abode outside the State during this entire time span. The dwelling places which petitioner maintained outside New York State while on permanent military assignment, whether on or off base, must be considered a permanent place of abode pursuant to 20 NYCRR 526.15(a)(2). In accordance with 20 NYCRR 526.15, once a member of the Armed Forces occupies housing in New York, either on or off the military base, said individual is considered to be a resident since he or she is maintaining a permanent place of abode in the State. If this is so, then the opposite must also be true, i.e., that housing maintained by military personnel outside New York State must necessarily be considered a permanent place of abode.

I also find that petitioner's parents' residence in East Setauket, New York cannot be considered as a permanent place of abode maintained by or for petitioner. Petitioner uses this address as a matter of convenience and said dwelling place is utilized by petitioner only on a temporary or transient basis on such occasions while he is visiting his parents.

D. Although petitioner has established that at the time that he took delivery of the vehicle in question he met all of the conditions set forth in Tax Law § 1117(a)(1), specifically that he was not a resident of New York; that he had no permanent place of abode in the State and that the vehicle was not used in any employment, trade, business or profession carried on in this State, my analysis does not end there. In order to be entitled to the exemption contained in Tax Law § 1117(a) petitioner must also meet the other three requirements as set forth in Tax Law § 1117(a)(2), (3) and (4).

E. There is no dispute in the instant matter that the vehicle in question was first registered in New York. Accordingly, it is clear that petitioner did not satisfy Tax Law § 1117(a)(3) which specifically provides that “the purchaser does not register such motor vehicle in this state prior to registering such motor vehicle in another state or jurisdiction.” It would also appear from the record that McCarville Ford, Inc., the vendor in this transaction, issued to petitioner a temporary certificate of registration or temporary registration and thus petitioner also failed to meet the conditions set forth in Tax Law § 1117(a)(2).

It is further noted that Tax Law § 1117(a) was last amended by chapter 170 of the Laws of 1994, effective December 1, 1994. This amendment, in effect, added the additional conditions enunciated in Tax Law § 1117(a)(2) and (3); specifically, that a nonresident purchaser of a motor vehicle who takes delivery of the vehicle in New York cannot register the vehicle in this state prior to registering it in another state or jurisdiction and that the vendor of the vehicle cannot issue to the purchaser a temporary certificate of registration. Had the law not been amended, petitioner would have been entitled to the refund he seeks. However, with the amendment to Tax Law § 1117(a) the Legislature has imposed additional conditions on nonresident purchasers of motor vehicles and petitioner clearly did not meet these additional conditions.

Finally, it is noted that petitioner, for whatever reasons, chose to first register the vehicle in New York rather than the Commonwealth of Virginia, the state in which he resided and maintained a permanent place of abode. It is interesting to note that petitioner has adduced no evidence to show that a sales or similar tax was paid on this vehicle to another state or taxing jurisdiction. For that matter, petitioner has not even alleged that he has paid tax on this vehicle to another state. Petitioner, a nonresident, chose to (i) purchase the vehicle from a vendor located in New York; (ii) accept delivery of the vehicle in the State; and (iii) first register the vehicle in New York. Having made these choices, petitioner cannot reasonably argue that he is entitled to the exemption from the retail sales tax on the purchase of the vehicle. Tax Law § 1117(a) is clear and unambiguous and petitioner simply did not meet *all* of the conditions for exemption as mandated by the statute. As a general rule, statutory exemptions from tax are strictly construed against the party claiming the exemption. The burden is upon petitioner to clearly establish his right to the exemption provided (*Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027).

F. The petition of Carl E. Berger is denied and the Division's letter dated September 9, 1999 denying his Application for Credit or Refund of Sales and Use Tax is sustained.

DATED: Troy, New York
January 24, 2002

/s/ James Hoefer
PRESIDING OFFICER